STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD PATRIC HILL,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 231387
Genesee Circuit Court
LC No. 00-005972-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to 60 to 120 months in prison for the home invasion conviction, and the sentence is to run consecutive to a parole violation sentence. We affirm.

I

According to the evidence adduced at trial, witnesses observed defendant break into their neighbors' house. Defendant left carrying a television set, which he placed into a car. During the breaking and entering, a 911 call was made to the police describing the make, model, and license plate of the automobile used to transport the stolen property. One of the witnesses, Jimmie Rice, followed defendant and was able to flag down Police Officer Renae Burnett before losing sight of defendant's car. Officer Burnett came upon the car that defendant had been driving. The car was parked and unoccupied. She saw a television set, a jewelry box, and a game machine on the backseat of the car. Officer Burnett ran a check on the license plate and determined that the owner of the car lived in that neighborhood, between five and six blocks from the area in which the car was found. Officer Burnett spoke with a neighbor and learned that defendant was the father of the owner's children, and that defendant sometimes drove the car. While they were talking, they noticed defendant walking down the street toward Officer Burnett's police cruiser.

With the assistance of other police officers, defendant was detained a short time later and was positively identified by Rice as the perpetrator of the home invasion. When the officers asked defendant for his name, he did not identify himself. Eventually, defendant was formally arrested and another officer asked defendant for his name at least twice. Defendant did not answer. Later, at the police station, defendant was asked whether he was Reginald Hill, and he

did not give a definitive answer. Ultimately, the police ascertained defendant's identity through other means.

At trial, defendant presented an alibi defense that was supported by his cousin and a school counselor. Although it was the defense's position that defendant was at an elementary school during the time of the breaking and entering, it was established that the school was only two and a half miles from the crime scene.

II

Defendant first argues that his Fifth Amendment privilege against self-incrimination was violated by the introduction of his custodial, pre-*Miranda*,[1] silence as substantive evidence of his guilt. Specifically, defendant challenges the prosecutor's opening statement and closing and rebuttal arguments in which the prosecutor argued that defendant's refusal to identify himself to police was evidence of his guilt. Defense counsel did not object to the prosecutor's use of defendant's silence. Accordingly, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Michigan jurisprudence on this issue has been consistent with federal precedent. *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990); *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992). See also *People v Sutton (After Remand)*, 436 Mich 575, 579; 464 NW2d 276, amended 437 Mich 1208 (1990); *People v Cetlinski*, 435 Mich 742, 759; 460 NW2d 534 (1990). Evidence of a defendant's unresponsiveness does not violate the Fifth Amendment right not to incriminate oneself where there is no basis to conclude that the defendant's unresponsiveness was attributable to an invocation of that privilege or in reliance on *Miranda* warnings. *McReavy*, *supra* at 202-203; *Schollaert*, *supra* at 163-164. Where a defendant's silence or non-responsive conduct does not occur during custodial interrogation or in reliance on *Miranda* warnings, it is not constitutionally protected and may be admitted as substantive evidence. *McReavy*, *supra*; *Schollaert*, *supra* at 165-167. See also, *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). Because the record is devoid of any indication that either circumstance was present here, we conclude that the evidence and argument regarding defendant's refusal to provide his name to police officers did not violate his privilege against self-incrimination.

We reject defendant's reliance upon *Combs v Coyle*, 205 F3d 269 (CA 6, 2000) because that case is easily distinguishable from the case at bar. The *Combs* court held that the use of the defendant's silence at trial was improper because the defendant "clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent without a lawyer present." *Id.* at 286. The record in the instant case suggests no such clear invocation of the privilege. As Justice Stevens stated in his concurrence in *Jenkins v Anderson*, 447 US 231, 243-244; 100 S Ct 2124, 2132; 65 L Ed 2d 86 (1980), which was cited in *Combs*, *supra*, the applicability of the privilege is contingent upon more than an individual's silence:

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> When a citizen is under no official compulsion whatever, either to speak or remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled *and then asserted his privilege, not simply whether he was silent*. A different view ignores the clear words of the Fifth Amendment. [Emphasis added.]

The pivotal question, which was not at issue in *Combs*, *supra*, is whether defendant's refusal to give his name to the police officers was an exercise of the privilege against self-incrimination.[2]

Defendant raises this issue for the first time on appeal, and he acknowledges that the record does not indicate that his "refusal to answer the officers' questions was in response to being informed he had an absolute right to remain silent." Defendant apparently does not consider this void in the record to be problematic. Rather, defendant seems to suggest that his silence is protected regardless whether he remained silent in reliance on *Miranda* warnings or as an invocation of his privilege against self-incrimination. Defendant's reliance on *Combs* ignores the crucial distinction in that case that the defendant "clearly invoked" his privilege against self-incrimination by instructing police to talk to his lawyer, whereas in the instant case, defendant's silence is ambiguous. In order to find that defendant's silence was an invocation of the privilege against self-incrimination, it is necessary to extrapolate from the record regarding defendant's state of mind at the time he refused to identify himself to police. Although arguably defendant's unresponsiveness is open to interpretation, we decline to engage in such speculation in the absence of findings by the trial court. We find no plain error.

Defendant also contends that his attorney's failure to object to the prosecutor's use of defendant's silence as substantive evidence denied defendant the effective assistance of counsel. We disagree. Counsel is not required to make frivolous objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). In light of our conclusion that the evidence of defendant's silence was not violative of defendant's Fifth Amendment privilege against self-incrimination, counsel was not ineffective for failing to object on that basis.

III

Defendant next argues that he was denied a fair trial and due process of law when the prosecutor made comments in front of the jury allegedly indicating a personal belief in

[2] Another distinction between *Combs*, *supra*, and the instant case is the nature of the police questioning. At issue in *Combs* was the defendant's response when police asked him "what had happened." *Combs*, *supra* at 278-279. In contrast, here, defendant's silence was referenced only in the context of his refusal to give his name to police. The Sixth Circuit has recognized that "in the context of routine booking following an arrest, [ ] 'routine biographical questions are not ordinarily considered interrogation.'" *United States v Ozuna*, 170 F3d 654, 657 n 1 (CA 6, 1999), quoting *United States v Clark*, 982 F2d 965, 968 (CA 6, 1993). See also *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *United States v Ventura*, 85 F3d 708, 712 n 5 (CA 1, 1996); *Cervantes v Walker*, 589 F2d 424, 428 n 5 (CA 9, 1978).

defendant's guilt and implying that the prosecution was aware of evidence other than that presented on the record that showed defendant's guilt. We disagree.

This Court reviews claims of prosecutorial misconduct de novo. *People v Pfaffl*e, 246 Mich App 282, 288; 632 NW2d 162 (2001). Issues concerning prosecutorial misconduct are reviewed case by case, and this Court will "examine the pertinent portion of the record and evaluate the prosecutor's remarks in context." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The prosecutor may not make a statement of fact to the jury that is not supported by the evidence, but it can argue the evidence and reasonable inferences arising from it as it relates to the theory of the case. *Schutte*, *supra* at 721. The prosecution need not use the least prejudicial evidence available to establish a fact at issue, and it is not required to state the inferences in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant immediately objected to the prosecution's statements, and the trial court sustained the objections. Regardless whether the prosecution's comments were improper, this was one isolated incident in a five-day trial. The trial court sustained the objection to the comments and told the prosecutor "not to go there," and the prosecutor complied. Further, the trial court instructed the jury:

> The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.
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> * * *
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> At times during the trial I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else.

In light of the fact that the trial court sustained defendant's objection to the prosecutor's comments, as well as the jury instructions, any prejudice arising from those comments was dissipated. Defendant was not denied a fair and impartial trial.

IV

Lastly, defendant argues that the trial court improperly admitted the testimony of Officer Burnett that the neighbor told her that defendant sometimes drove his girlfriend's car. Defendant argues that the admission of this hearsay evidence prejudiced him and is error requiring reversal. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In this case, the statement was not offered to prove that defendant was driving the car that was seen at the scene of the home invasion, and in which the stolen items were found. The statement was offered to explain why the police officer called for backup and had defendant taken into custody. Extra-judicial statements introduced as evidence to show the motives of police officers for arresting a defendant, rather than to prove the truth of the matter asserted, are not hearsay. *City of Westland v Okopski*, 208 Mich App 66, 527 NW2d 780 (1994); *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988). Therefore, the neighbor's statement was not hearsay and the trial court did not abuse its discretion in admitting the statement that defendant drove the car on occasion. Moreover, evidence of a traffic citation and the testimony of defendant's alibi witness that he had seen defendant bring his son to school in the car on several occasions suggested that defendant had access to the car. Accordingly, even assuming arguendo that the statement was inadmissible hearsay, the evidence was cumulative and its admission does require reversal. Likewise, the failure of the court to give a limiting instruction regarding the proper use of the testimony, i.e., that it could not be used as substantive evidence of defendant's guilt, was not error requiring reversal because defendant's substantial rights were not affected. MCR 103(a).

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot